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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CYNTHIA JEAN FUSON,

Defendant and Appellant.

H043336

(Santa Clara County

Super. Ct. No. CC823977)

Defendant Cynthia Jean Fuson appeals from the order denying her petition to designate her felony conviction of Penal Code section 666¹ (petty theft with a prior) as a misdemeanor pursuant to section 1170.18, subdivision (f), a section added by Proposition 47. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 14, pp. 73-74, eff. Nov. 5, 2014; see Cal. Const., art. II, § 10, subd. (a).)

“Proposition 47, an initiative measure the electorate passed in November 2014, reduced certain drug-related and property crimes from felonies to misdemeanors.” (*People v. Morales* (2016) 63 Cal.4th 399, 403.) Section 1170.18 provides that an eligible person who has completed his or her felony sentence for a crime that was reduced to a misdemeanor by Proposition 47 after the crime was committed could apply to have the felony conviction designated as a misdemeanor. (§ 1170.18, subd. (f).)

In 2011, years before defendant filed her petition for redesignation under section 1170.18, the trial court set aside her no contest plea to felony petty theft with a

¹ All further statutory references are to the Penal Code unless otherwise indicated.

prior and dismissed the information under section 1203.4. In ruling on defendant's subsequent petition for redesignation, the trial court considered the dismissal under section 1203.4 to be an expungement of the felony conviction, and the court consequently determined that relief under section 1170.18 was unavailable.

Defendant asserts that the trial court erred in refusing to consider her petition on its merits, and the People concede the error. We agree that the order must be reversed.

I

Procedural History

By information filed March 12, 2009, defendant was charged with committing a felony petty theft with a prior burglary conviction (§ 666) on or about October 28, 2008. The information alleged that defendant had suffered a prior felony conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), specifically, a residential burglary (§§ 459-460, subd. (a)), and that she served a prior prison term (§ 667.5, subd. (b)) for grand theft (§§ 484-487, subd. (a)). On May 4, 2009, defendant pleaded no contest to the petty theft with a prior and admitted the allegations.

By written request, defendant asked the trial court to dismiss her prior felony conviction within the meaning of Three Strikes law in the interests of justice.

(See § 1385, *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530.)

On July 17, 2009, the trial court granted the motion.² The trial court suspended imposition of sentence and placed defendant on three years of formal probation.

² Defendant's motion did not ask the trial court to strike the admitted prior prison term enhancement (§ 667.5, subd. (b)). The reporter's transcript for July 17, 2009 does not reflect that there was any oral request to strike the enhancement or that the trial court struck the enhancement. But the July 17, 2009 minute order, which was not signed by the judge, indicates—we think mistakenly—that the trial court struck the prior prison term enhancement pursuant to section 1385. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of the court's oral pronouncement prevails over the clerk's minute order]; *People v. Smith* (1983) 33 Cal.3d 596, 599 [where the reporter's and clerk's transcripts are in conflict, they will be harmonized if possible, but if they cannot be (continued)]

On March 2, 2011, following her successful completion of a drug treatment program, the trial court set aside defendant's plea to felony petty theft with a prior, entered a not guilty plea, and dismissed the information pursuant to section 1203.4.

In a written "Waiver and Stipulation for Resentencing or Redesignation of Offenses (Penal Code § 1170.18)," filed on December 18, 2015, the district attorney and defendant stipulated to certain facts. It indicated that defendant had completed her sentence, that defendant was eligible to have her felony conviction of petty theft with a prior redesignated as a misdemeanor under section 1170.18, subdivision (f), and that the trial court had authority to issue an order redesignating the offense without a hearing.

The trial court nevertheless denied the petition. In its written order, filed January 19, 2016, the court explained its reasoning: "[A]ny conviction was expunged pursuant to Penal Code § 1203.4 by Court order on March 2, 2011. The order of expungement set aside and vacated each conviction, entered a not guilty plea and dismissed the complaint. 'By virtue of expungement, there no longer is a prior conviction.' [Citation.] Penal Code § 1170.18 makes no provision for misdemeanor treatment of felony convictions after those convictions have been set aside and the accusations dismissed."

Defendant appeals from the order denying the petition for redesignation under section 1170.18.

II

Discussion

Section 1203.4, subdivision (a)(1), provides that, once an accusation or information against a defendant is dismissed under that section, the defendant "shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle

harmonized, the determination of which prevails depends upon the circumstances of the particular case].)

Code.”³ Section 1203.4, subdivision (a)(1), further states: “However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed. The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.” Thus, section 1203.4’s release of a defendant is not absolute.

Section 1170.18, subdivision (f), provides: “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.” Subdivision (g) of that section states: “If the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor.” “Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subsection (f).” (§ 1170.18, subd. (h).)

In *People v. Tidwell* (2016) 246 Cal.App.4th 212 (*Tidwell*), this court recognized that section 1203.4 “ ‘does not, strictly speaking, “expunge” the conviction, nor render the conviction “a legal nullity.” ’ [Citation.]” (*Tidwell, supra*, at p. 217.) After examining both section 1203.4 and section 1170.18 and the intent of the legislative body

³ Vehicle Code section 13555 provides: “A termination of probation and dismissal of charges pursuant to Section 1203.4 or a dismissal of charges pursuant to Section 1203.4a of the Penal Code does not affect any revocation or suspension of the privilege of the person convicted to drive a motor vehicle under this chapter. Such person’s prior conviction shall be considered a conviction for the purpose of revoking or suspending or otherwise limiting such privilege on the ground of two or more convictions.”

in adopting Proposition 47, we determined that “[t]o foreclose defendant’s eligibility based on the section 1203.4 dismissal would contravene [the legislative body’s] intent, where defendant has met the criteria under section 1170.18 according to the terms of the statute.” (*Tidwell, supra*, at p. 219.) We found that “the intent behind a grant of relief under section 1203.4” did not “undermine or conflict with the later application of section 1170.18.” (*Ibid.*) We concluded that the trial court erred by denying the defendant’s applications for redesignation pursuant to section 1170.18, subdivision (f), on the ground that he already had obtained dismissals pursuant to section 1203.4. (*Tidwell, supra*, at p. 220.)

The Attorney General suggests that, under *Tidwell*, the matter should be remanded to the trial court to allow it to consider the merits of defendant’s petition for redesignation under section 1170.18. We agree that is the proper disposition.⁴

DISPOSITION

The order denying defendant’s petition for redesignation pursuant to section 1170.18, subdivision (f), is reversed. The matter is remanded with directions to consider the petition on its merits.

⁴ Our conclusion obviates the need to address defendant’s equal protection claim.

ELIA, ACTING P.J.

WE CONCUR:

BAMATTRE-MANOUKIAN, J.

MIHARA, J.